HJ. SAZALI DATUK HJ. NOOR TAHIR, RE

HIGH COURT SABAH & SARAWAK, KUCHING
CHONG SIEW FAI J
[ORIGINATING MOTION NO. KG. 19 OF 1991]
22 MAY 1992

PREVENTIVE DETENTION: *Order of certiorari - Application that order for remand in drug rehabilitation centre be quashed - Duty of Magistrate when dealing with s. 6(3) and 6(4) of the Drug Dependants (Treatment and Rehabilitation) Act 1983.*

CIVIL PROCEDURE: *Affidavit by Magistrate explaining decision - Situations when it is appropriate.*

The application was for a *certiorari* to quash the order of the Magistrate remanding the applicant at the Sarawak Drug Rehabilitation Centre (the Centre) for 2 years and for an order that his (applicant's) name be suspended from the roll therein.

It was alleged that the Magistrate had failed to abide by s. 6(3) and 6(4) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the said Act) which required the Magistrate to consider the report of the Rehabilitation Officer and the circumstances of the case and other matters relating to the background of the applicant (as set out in s. 6(4) of the said Act) before he made the order for remand.

The learned Magistrate filed an affidavit in which he averred that he had considered all the relevant matters so required of him by the law.

Held:

[1] The affidavit of the Magistrate should be disregarded. Since he had not stated in his notes of proceedings that he had considered and given regard to the aforesaid relevant matters, he could not subsequently explain away or add reason to his decision by putting in an affidavit to that effect. A Magistrate may properly make such an affidavit in certain other situations, for instance, when his character or *bona fide* is called into question upon judicial review of his decision.

[2] The omission of the learned Magistrate to state in his notes of proceedings his consideration of the aforesaid report or of the matters set out in s. 6(4) of the said Act or even that he was satisfied that the subject had to undergo treatment and rehabilitation indicated these matters may not have influenced his thinking process in arriving at his decision. It is all the more imperative to indicate clearly reasons for the decision in cases where the liberty of a person is at stake.

[3] The "residing" order made by the learned Magistrate under s. 6(1)(a) is amenable to *certiorari* or judicial review.

[Motion allowed. The order of the learned Magistrate was quashed.]

Cases referred to:
R v. Camborne JJ. ex. p. Pearce [1955] 1 QB 41 ***(cit)***
R v. Thornton & Ors. JJ. [1898] 67 LJQB 249 ***(cit)***
Re Roshidi b. Mohamed [1988] 2 MLJ 193 ***(foll)***

Legislation referred to:
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 6(1)(a), (3), (4), 24

For the applicant - Idris Hj. Buang; M/s. Idris Buang, Ibrahim Baki & Co.
For the respondent - Mahmud Abdullah

JUDGMENT

Chong Siew Fai J:

The applicant, Haji Sazali bin Datuk Haji Noor Tahir, applies for an order of *certiorari* to remove into this Court for the purpose of being quashed, an order made by a learned Magistrate, at Kuching, on 29 July 1991 and for an order that his name "be suspended from the roll of the Drug Rehabilitation Centre".

The facts are brief and simple. On or about 21 July 1991 the applicant was arrested by the police on suspicion of being a drug-dependant. On 23 July 1991 he was remanded for 7 days at the Sarawak Drug Rehabilitation Centre (the Centre) to enable tests to be conducted as to whether the applicant was a drug dependant. On 29 July 1991, the applicant was brought before the trial Magistrate who ordered him "to be remanded" at the Centre for 2 years with effect from the date of the order.

Two grounds are relied on in support of the application:

(1) that the learned Magistrate failed to consider the Rehabilitation Officer's report as required under s. 6(3) of the Drug Dependants (Treatment And Rehabilitation) Act 1983 (the Act); and

(2) that the learned Magistrate failed to comply with s. 6(4) of the Act in that he did not have regard to the circumstances of the case and the character antecedents, age, health, education, employment, family and other circumstances of the applicant.

Before dealing with the above grounds, it would be convenient to dispose of one point. In answer to the applicant's contention of failing to consider and to have regard to the matters specified in the 2 grounds above, the learned Magistrate made an affidavit on 27 February 1992 to the effect that before making the "residing" order he had duly considered the matters stated in the grounds. Counsel for the applicant contends that the affidavit is irrelevant and ought to be excluded. On the facts and circumstances of the instant case, I agree that it is not open or appropriate for the learned Magistrate to subsequently explain away or add reason to his decision by stating as he did, namely, that he had considered and given regard to the said matters, when in his judgment contained in the note of proceedings he apparently was not shown to have done so. In my view, such affidavit cannot be used since the judgment itself forms the focal point of argument. I would therefore disregard the said affidavit as well as the subsequent "corrective affidavit" of the learned Magistrate affirmed on 28 April 1992. However, I must not be taken to mean that under no circumstances can a presiding Magistrate make an affidavit when his decision is the subject matter of judicial review. That would be too general a statement. In certain situation he might be justified and, indeed, entitled to do so or even to appear at the hearing, for example, when his character or *bona fide* is called in question. *R v. Camborne JJ. ex. p. Pearce* [1955] 1 QB 41; *R v. Thornton & Ors. JJ.* [1898] 67 LJQB 249.

Now, as to the grounds of the application, s. 6(3) of the Act, *inter alia*, requires a Magistrate, before making a "residing" order under s. 6(1)(a) thereof, to consider a report by a Rehabilitation Officer on the person against whom the order is intended to be made ("the subject"). And s. 6(4) thereof enacts that in making the said order, the Magistrate shall have

regard to the circumstances of the case and the character, antecedents, age, health, education, employment, family and other circumstances of the subject. In both subsections, the word "shall" is used.

In the instant case, though the note of proceedings indicates that the medical report (Exh. P1) and the "social" report (Exh. P2) were tendered, that the "social" report was read and explained to the subject who understood it and admitted it to be correct, and that submissions on behalf of the parties were heard, no reason, however, was given nor was the learned Magistrate shown or stated to have considered and given regard to the matters specified in subsections (3) and (4) of s. 6 of the Act. So far as relating to the decision, all that appears in the note of proceedings was that the learned Magistrate made the following order:

> Subject is to be remanded at Drug Rehabilitation Centre Sarawak for a period of 2 years with effect from today to undergo treatment and rehabilitation.

Nor was it stated in the note of proceedings as to whether the learned Magistrate was satisfied that the subject required to undergo treatment and rehabilitation at the Centre. (See s. 6(1)(a) of the Act).

It is essential that Magistrates give reasons for their decisions. This is all the more necessary where, as in the instant case, liberty of a person is involved and where the law requires that before making an order, the Magistrate "shall consider" a report of the Rehabilitation Officer (Section 6(3) and "shall have regard" to the circumstances and the other factors as specified in s. 6(4). It is incumbent on the Magistrate to indicate in his judgment that the provisions of the said subsections have not been overlooked. No particular form of words is needed for the purpose. What is necessary is that the Magistrate's mind should be clearly revealed that he has considered the matters. The absence of any recording that they had been considered indicates the possibility that the matters may not have influenced the mental process of the presiding Magistrate in arriving at his ultimate decision.

I have considered and found no merits in the argument of the learned Federal Counsel. As conceded, the signed order pursuant to s. 6(1)(a) of the Act (p. 18 of the bundle of documents) was executed **after** the decision appearing in the note of proceedings had been made by the learned Magistrate. The signed order appears to be in standard form, cyclostyled. All that was needed to be done was to fill in the blanks and delete whatever was inapplicable. What the applicant challenges is the decision making process that is the process of making the decision on 29 July 1991 **before** the signed order came into being.

Contrary to the contention of the learned Federal Counsel, *Re Roshidi b. Mohamed* [1988] 2 MLJ 193 referred to by learned Counsel for the applicant is, in my view, relevant and of assistance.

I am unable to accept the argument that an order under s. 6(1)(a) of the Act is not amenable to *certiorari* or judicial review.

I also disagree that s. 24 of the Act has the effect of relieving a Magistrate from the need to record anything in coming to his decision. The section deals with jurisdiction of Magistrates in relation to areas or localities and places for exercising the powers under certain sections of the Act.

For the above reasons, the motion is allowed. The order of the learned Magistrate made on 29 July 1991 be removed forthwith into this Court and be quashed.

I should make clear that the above decision is arrived at after considering the decision-making process, that is it has not been shown from the notes of proceedings that the learned Magistrate had considered the requisite matters as required by law before making the order as he did. No aspersion should be cast on the credibility of the learned Magistrate by reason of the contents of his affidavits made on 27 February 1992 which I have earlier held to be disregarded for the purpose of this motion.

Also found at [1992] 3 CLJ 1753